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# In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 688

THE BORDEN COMPANY, PETITIONER

*v.*

JOSEPH BORELLA, ET AL., RESPONDENTS

*ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, AS AMICUS CURIAE

### OPINIONS BELOW

The opinion of the district court (R. 102–106) is reported in 52 F. Supp. 952. The majority and dissenting opinions in the circuit court of appeals (R. 128–132) are reported in 145 F. 2d 63.

### JURISDICTION

The judgment of the circuit court of appeals was entered on August 18, 1944 (R. 133). The petition for a writ of certiorari was filed on November 16, 1944, and was granted on January 2, 1945 (R. 134). The jurisdiction of this Court

rests on section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

## QUESTION PRESENTED

Respondents are the maintenance employees in a building used primarily as the headquarters of a large manufacturing enterprise, engaged in the manufacture of milk products and other food products in numerous factories located throughout the United States and in foreign countries. These factories are engaged in the manufacture of products for interstate commerce. Petitioner's entire business, including the detailed direction of its many factories, is supervised, managed and controlled by the executive, administrative, clerical and other employees working in the headquarters building. The question is whether the maintenance employees in this building are engaged "in any process or occupation necessary to the production" of goods for commerce within the meaning of the Fair Labor Standards Act.

## STATUTORY PROVISIONS INVOLVED

Section 7 of the Act (c. 676, 52 Stat. 1060, 29 U. S. C., sec. 201 et seq.) requires payment of overtime compensation to employees "engaged in commerce or in the production of goods for commerce." Section 3 (j) of the Act defines "produced" and "production of goods" as follows:

> SEC. 3 (j) "Produced" means produced, manufactured, mined, handled, or in any

other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

## STATEMENT

Since respondents' brief contains (pp. 6–30) a detailed and comprehensive account of the activities carried on in the building, we are limiting our statement to a summary of the evidence which seems to us most significant.

Respondents are elevator operators, porters, and night watchmen in a 24-story building at 350 Madison Avenue, in New York City, which houses and is used primarily as petitioner's central office. This building, known as the Borden Building, is owned and operated by petitioner (R. 8). Although some of the space in the building is leased to other tenants, the building is devoted primarilly to the Borden Company's business. Approximately 17 of the 24 floors in whole or in part, and 58% of the total rentable area, are occupied by petitioner (R. 118), which has over 800 of its employees in the building (R. 98). Petitioner is a New Jersey corporation engaged in the business of manufacturing milk products and other food

products[1] "throughout the United States and in foreign countries" (R. 117). It has factories all over the United States and in Canada (*ibid.*), and during the period involved in this suit did a business of well over $200,000,000 annually (R. 100).[2] The factories are admittedly engaged in the production of goods for interstate commerce (R. 43–44). The building here involved is used as headquarters for directing and controlling the manufacture of all the Borden products.

As shown by the recital below, not only are the operations of the various factories coordinated at this central office, but the actual manufacturing processes in the individual plants are directed in the minutest detail from this building. Every step of the manufacturing processes in the various factories is dictated or controlled by employees at these headquarters. The purchase of raw materials and supplies, the methods of production, the amounts to be produced, the quantity and character of the labor used, the safety measures, the budgeting and financing, labor problems, and the maintenance of the plants and equipment, are all directed from this building.

[1] Included among the manufactured products are casein, milk sugar, condensed and evaporated milk, cheese and cheese products, vitamin concentrates, poultry and animal foods, dehydrated soups and powdered coffee (R. 46, 43, 24). Petitioner also manufactures tin cans for its products (R. 46).

[2] The 1943 sales amounted to over $370,000,000, and the 1944 sales record was over $410,000,000. *The New York Times*, March 16, 1945, p. 25.

"Running instructions" concerning every aspect of production are issued by the Manufacturing Department in the Borden Building in New York to the factories located throughout the country (R. 43–44). This department controls the supply of raw materials for each plant, determines increases and decreases in production, and initiates and directs changes in the method of manufacture (R. 43–44, 47). Problems arising with respect to labor, repairs, plant expansion, and purchase of plant equipment must be referred to New York (R. 44–45). The Manufacturing Department employs the head manufacturing personnel for the various factories, draws up the plant budgets, arranges for the financing and construction of increased plant facilities, and sends out engineers to inspect the plants and report on their efficiency (R. 45–46). Plant superintendents have discretion only in the conduct of routine business; "they are entirely controlled by the manufacturing department" (R. 43). This close and detailed supervision is fostered by a system of constant communication between the central office and the factories throughout the country. Direct wires through teletype machines located on three floors of the Borden Building run to petitioner's various factories all over the nation, thus assuring immediate communication between the central office and the branch plants (R. 26).

Other central departments vital to the manufacturing process in all the factories are likewise

located in the Borden Building. Substantially all the raw materials, supplies, and machinery required by the Borden factories for the production of goods are purchased through the head office (R. 69–70). The Central Purchasing Department determines factory requirements and negotiates contracts for the purchase of needed commodities such as coal, machinery, sugar, cocoa, coffee, cleaning powder, malt, liquor, tinplate, labels, ice cream cartons, boxes, caps, barrels, and bottles (R. 70). Priorities and allocation of materials among the various factories are determined by the Priorities Division in the home office (R. 54). Direction of safety measures for all of petitioner's factories is similarly coordinated by the Safety Bureau in New York, which is responsible for investigating safety methods and devices and issuing instructions to the plants (R. 71–72). Legal problems, labor and union problems, insurance requirements, income tax reports, and questions relating to the leasing and purchase of real estate are likewise handled on a nation-wide basis by the central office (R. 36–37, 54, 77, 51–52, 80).

By means of the system of accounting controls operated by its employees in this building petitioner maintains detailed and complete reports of inventories, volume and cost of production, and tax records for each of the factories (R. 13–14, 48). The control exercised by the headquarters office over each plant's financial operations is so complete that the accounting department in this build-

ing is informed of every petty cash payment made by a factory. (R. 47–48). The accounting division issues "all accounting instructions to the various factories", including instructions as to "production figures, disbursements, receipts, and the issuance of factory shipped goods through the medium of invoices" (R. 13). An additional type of supervision is provided by a staff of traveling auditors who "visit each factory for the purpose of internal control" (R. 14).

In addition to the Manufacturing Department, which entirely controls the production of all "manufactured products" except casein and milk sugar (R. 43), and which sends "running instructions" to the various factories regarding the manufacture of such products, there is a Special Products Division (R. 74–75), a Casein Division (R. 15–21), and a National Milk Sugar Department (R. 23). With respect to casein products the Casein Division purchases the raw materials for the factories (R. 20), issues "manufacturing instructions" to the factories (R. 20), establishes their price policy (R. 19), prepares all the advertising, and arranges for the sending of samples from the factories to prospective customers (R. 18). Similar functions are performed by the National Milk Sugar Division with respect to milk sugar products. As in the case of the Casein Division, "the factories are instructed from this office as to production, procedure, distribution,

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and other matters" (R. 23). Comparable functions are performed by the Special Products Division for the factories manufacturing animal foods, livestock foods, poultry foods, vitamins, flavors, and concentrates (R. 74–75).

Finally, a considerable amount of "goods" or "articles or subjects of commerce" is produced in the Borden Building itself. The Photostat Division makes photostatic copies of financial statements and various other papers which are sent out to the various branch offices (R. 55–56). Photo offset work is also done in the building—a process which is "part photography and part printing" (R. 57). By this process are produced copies of financial statements, instructions to plants and factories, copies of various Government rules and regulations, and printed forms to be used for the reports of branch offices. All these articles are then sent to the various branch offices. A Label Department in the building passes on all the labels used on Borden Company products (R. 40–41). Although the printing of the labels is done by independent printers, many of the sample labels are designed and prepared in the Borden Building (*ibid.*). Much of the advertising work is also done in this building. "The original ideas for the advertising are commonly created in this building by men working in this building" (R. 76). Drafts of advertisements are frequently prepared in the building, and "the advertisement in final form is always approved in this building" (*ibid.*). In the

experimental kitchen "experimenting with recipes for our products" is carried on (R. 78). The recipes resulting from these experiments are then made up in booklet form, and sent out to the trade over the country (*ibid.*). In the experimental laboratory, experiments for the manufacture of new food products are made and instructions and samples are then sent to the various factories for production in larger amounts (R. 79).

The district court found that petitioner "does business throughout the United States and in foreign countries" (Fdg. 4, R. 117), and that it "directs, supervises, manages and controls its entire business through the * * * directors, officers and employees" working in the Borden Building (Fdg. 10, R. 118). It ruled, however, that the "actual production of goods for commerce is carried on" elsewhere than in the Borden Building, and that there was no production of such goods in the building (R. 104); that the preparation and drafting of labels, photostats, and advertising material did not constitute "production of goods" within the meaning of the Act (R. 103); and that the case was controlled by *McLeod* v. *Threlkeld*, 319 U. S. 491, and *Stoike* v. *First National Bank*, 290 N. Y. 195 (1943), certiorari denied, 320 U. S. 762, rather than by *Kirschbaum Co.* v. *Walling*, 316 U. S. 517.

The circuit court of appeals, reversing the district court, held that respondents were engaged

in processes or occupations necessary to the production of the Borden products regardless of "the circumstance that administrative officials do not come in physical contact with the goods at any stage of their production" (R. 131). The court reasoned that those "who direct the whole conduct of an industry" are engaged in "production" as clearly as are the artisans in the factory or the dispatching clerks on the shipping platforms, and that therefore there appeared "no reason that could have induced Congress, having included employees who made tenantable the quarters of artisans and shipping clerks, to exclude those who made tenantable the quarters of the president, the managers, the cashiers, superintendents and the rest" (R. 131, 132).. The court expressed no opinion on the contention that physical production of goods was carried on in the building by reason of the preparation, drafting and handling of labels, photostats, advertising and other materials.[3]

## SUMMARY OF ARGUMENT

A. Affirmance of the judgment may properly be rested on the ground assigned by the court below. *Kirschbaum Co.* v. *Walling*, 316 U. S. 517, is authority for the conclusion that maintenance

[3] In *10 East 40th Street Building, Inc.*, v. *Callus, et al.*, this Term, No. 820, the companion case here, the Second Circuit Court of Appeals did hold that the designing and preparation of advertising material, and lithographed and printed matter by publicity concerns, constituted "production of goods" within the meaning of the Act.

employees of an office building are engaged "in the production of goods" within the meaning of the Fair Labor Standards Act when the tenants of the building conduct in the building the physical processes of the manufacture of goods. Nothing in that opinion, however, suggests that the term "production of goods" is limited in application to the physical processes of manufacture. Here, factually, the management processes performed in the building by its principal occupant are as integral and vital a part of the "production" of petitioner's goods as are the physical processes of manufacture performed elsewhere. Every significant operation of manufacture by an immense business organization producing goods throughout the United States and abroad is initiated, supervised and directed from this building. The control is not general, it is detailed and meticulous. The superintendents of the individual factories exercise practically no judgment of their own, but "are entirely controlled by the manufacturing department" located in this building. A realistic understanding of the facts of industrial organization leads to the conclusion that the operations conducted in this building are themselves "production" in every significant sense, rather than, as petitioner would have them, "once removed" from production. Since it is unquestionable that the services of the maintenance employees here involved are as "necessary to" the operations of the Borden Company in this

building as were the services of the maintenance employees to the operations of the manufacturing tenants in the *Kirschbaum* case, the decision should be the same in both cases.

B. Although the court below did not find it necessary to consider the fact that apart from its management operations petitioner also engages in substantial physical production of goods in the building, the record establishes that to be the case. Petitioner's employees in the building engage regularly in drafting, writing, photostating, mimeographing, assembling, packaging, and shipping such materials as labels, photostats, reports, advertising copy, and other matter falling within the statutory definition of "goods." We believe that the operations of these employees constitute the "production of goods" within the meaning of the Act, even in the physical sense to which petitioner would limit the phrase; and therefore we believe that the judgment below might properly be affirmed on this ground also.

## ARGUMENT

### RESPONDENTS ARE ENGAGED IN OCCUPATIONS "NECESSARY TO THE PRODUCTION" OF GOODS FOR COMMERCE WITHIN THE MEANING OF THE FAIR LABOR STANDARDS ACT

The court below was correct, we believe, in holding that respondents are engaged in occupations necessary to the production of petitioner's milk products and food products. The holding was based on the court's conclusion that respondents'

occupations were "necessary" to petitioner's management operations conducted in the Borden Building, and that these management operations themselves constituted as essential a part of the production as the physical operations of manufacture involved in *Kirschbaum Co.* v. *Walling*, 316 U. S. 517. It is our view that this ground is of itself sufficient to justify the holding that respondents are within the coverage of the Act, and that it is accordingly unnecessary to consider any other basis of coverage. Nevertheless, we believe that the decision of the court below might also be affirmed on the ground that there is substantial physical production of goods for commerce in the Borden Building, in that labels, photostats and other such materials are drafted, handled and otherwise physically worked on in the building.

A. *Respondents' duties are necessary to the production of petitioner's milk products and food products*

That maintenance employees, such as respondents, are covered by the Act when goods are physically processed and handled in the building which they maintain has been settled by *Kirschbaum Co.* v. *Walling*, 316 U. S. 517. The question presented here is whether a distinction should be drawn between employees who maintain a building in which the physical processes of manufacturing are carried on and employees who maintain a building in which no physical manufacturing is

carried on but from which the whole course of production is directed, supervised and controlled in every detail.

The activities carried on in the building involved here are as integral a part of the production of the finished milk products and food products as are the manufacturing processes physically conducted elsewhere. The work of the employees (including respondents) in the Borden Building is "part of an integrated effort for the production of goods" (see *Armour & Co.* v. *Wantock*, 323 U. S. 126 at 130). We submit that "practical considerations" pertaining to the particular course of business here involved,[4] as well as "larger considerations of national policy, legislative history, and administrative practicalities" (*Kirschbaum Co.* v. *Walling*, 316 U. S. at 523), support the conclusion that respondents are necessary to such production within the meaning of the Act.

The Borden Company maintains and operates its building in New York for the purposes of its business of making and selling Borden products.[5]

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[4] See *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, and *Overstreet* v. *North Shore Corp.*, 318 U. S. 125, 128.

[5] The leasing of space to other tenants in the Borden Building is purely incidental to the main purpose and use of the building. In this significant respect, the instant case is different from the companion case *10 East 40th Street Building, Inc.*, v. *Callus, et al.*, this Term, No. 820. A separate brief *amicus* is being filed on behalf of the Administrator in the latter case. The cases are comparable in many essential aspects, and we believe that the maintenance employees in

The activities carried on by employees in the building are all directed to the production of goods for commerce. The key officials in the actual manufacturing processes are located and perform their functions in the building. Although geographically removed from the manufacturing plants, they direct, supervise, and control, immediately and in detail, each step of the manufacturing processes in the individual factories. The communication system, consisting of direct teletype wires, a constant and continuous stream of reports back and forth, and traveling auditors, engineers, and other representatives, insures the closest possible tie between the activities at headquarters and the manufacturing processes at the factories.

This functional integration is strengthened and sustained by petitioner's hierarchical system of management, whereby every substantial decision or action to be taken at any branch plant must emanate from, or be approved by, the key employees in the home office. Every action in an individual factory must be coordinated, through the home office, with the operations in the other factories. The Controller of petitioner's Manufacturing Department testified that that Department,

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the *Callus* case are likewise within the coverage of the Act. However, the situation involved in the *Callus case*, where the building is occupied by a variety of tenants engaged in many different businesses and where the building as a whole is not integrated with the business of any one tenant engaged in the production of goods for commerce, obviously presents a more complex problem.

located in the building, is the "pulse" of the supply and demand condition of the individual factories throughout the United States (R. 44). He testified also that the superintendents of the individual factories exercise practically no judgment of their own, but "are entirely controlled by the manufacturing department" (R. 43). The evidence indisputably shows that the manufacturing processes at the various factories are wholly dependent upon the activities of the employees at the main office. The employees at the home office determine what raw materials shall be delivered to the factories, the quantity and character of their production, the manner in which the plants shall operate, what equipment shall be installed in the plants, how labor and personnel problems shall be dealt with; in other words, they handle practically every detail of the manufacturing processes except the physical making of the products.

It is generally recognized in the industrial world that such management, control and clerical activities are as much a part of the manufacturing process as the manual operations performed at the work bench or machine. The Census of Manufactures, for example, includes under the classification "manufacturing employees" "(1) managers, superintendents, and other supervisory employees, and responsible professional and technical employees; (2) clerks, stenographers, and other clerical employees; and (3) wage earners" (the latter including "those who perform manual

work, using tools, operating machines, handling materials and products, and caring for the plant and its equipment").[6] The picture of factual integration shown by the record in the instant case plainly substantiates the soundness of this classification, and affords no reasonable basis for creating heretofore unrecognized distinctions for the purpose of construing the broad statutory definition of "production."

Petitioner's position is premised basically upon the assumption that only employees performing the manual work are "manufacturing" or "producing" employees, and that executive, administrative, supervisory, and clerical employees are in the separate and distinct category of persons "necessary to" production. Starting from this premise, fallacious, we believe, petitioner, by a process of "dialectical progression",[7] reasons that the latter employees are "once removed" from production and that any functions which are necessary to their work are "twice removed" from production (Pet. Br. 11). Activities "twice removed", according to petitioner's formula, are not "necessary to" production within the meaning of the statutory language.

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[6] Sixteenth Census of the United States, 1940, Manufactures, Vol. I, pp. 3–4. Data for central administrative-office personnel, although reported and collected separately from data on manufacturing plants, are also included in the Census of Manufacturers. *Id.*, p. 3.

[7] Cf. the opinion of the court below (R. 130).

Whatever merit this formula may have in apparent simplicity, we believe that it imports an awkward artificiality into the problem, and lacks that "practical judgment" which this Court has held must govern in determining what is "necessary to production" within the meaning of the Act. *Armour & Co.* v. *Wantock*, 323 U. S. 126, 130; *Kirschbaum Co.* v. *Walling*, 316 U. S. at 526; see also *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, 570; *Overstreet* v. *North Shore Corp.*, 318 U. S. 125, 128. It rests upon too mechanical and unrealistic an assumption, namely, that only the manual, physical work of producing goods is manufacturing or production proper, and that management operations are "once removed" therefrom. It refuses to recognize that the supervisory, management, accounting and clerical functions of a complex modern business enterprise may be—and here are—as indispensable and integral a part of the "production" of the enterprise as are the physical and manual operations. "Machinery and materials may be put to work, workers may labor, but without adequate management to organize and consolidate them into a profitable, co-ordinate whole, to distribute the results of their work effectively, and to govern their operations during performance, this performance may become so uneconomic as to cease entirely."[8] Doubtless the Act contemplates the drawing of a

[8] Lansburgh, R. H., and Spriegel, W. R., *Industrial Management*, 1940, p. 1.

line between activities which constitute production itself and those which are "necessary to" production; but petitioner's effort to draw the line rigidly at the boundary of physical operations is warranted neither by the statutory language nor by policy, nor is it consistent with the facts of industrial organization.

Application of the "practical judgment" called for by the *Armour* and *Kirschbaum* cases, with due consideration to the underlying policy of the Act to respect "the relation between state and national authority" (see *Kirschbaum Co.* v. *Walling*, 316 U. S. at 525), leaves no basis for concluding that the maintenance employees in the building are any the less "necessary" to petitioner's production of goods for commerce than are the maintenance employees in the factory in which the goods are physically manufactured. Respondents' services are performed for petitioner, the Borden Company, which has "no ostensible purpose for being in business except to produce goods for commerce" (see *Armour & Co.* v. *Wantock*, 323 U. S. at 130). As this Court pointed out in the *Armour* case: "More is necessary to a successful enterprise than that it be physically able to produce goods for commerce. It also aims to produce them at a price at which it can maintain its competitive place, and an occupation is not to be excluded from the Act merely because it contributes to economy or to continuity of production rather than to volume of production" (323 U. S.

at 131). The nature of petitioner's industrial organization and its course of business—"its environment and position"—are such that the operation and maintenance of a central office building are practically necessary to the economy, efficiency and continuity of production, and petitioner "actually operates the work [of the maintenance employees in the Borden Building] as part of an integrated effort for the production of goods" (*id.*, at 130).*

If, as we have shown, the executive, supervisory, administrative and clerical activities carried on in the Borden Building constitute an integral part of the production of goods for commerce within the meaning of Section 3 (j), it follows that re-

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* This concentration of certain phases of the productive processes in a home office has become a common practice since the development of large scale multi-unit organizations and particularly with large concerns "producing and distributing dairy products". See the Temporary National Economic Committee's study entitled "*The Structure of Industry*", pp. 165–166. The purpose of such concentration is unquestionably to effect economy and efficiency of production (*id.*, pp. 109–11; see also R. 43–44). The record in this case contains some particularly good illustrations of the vital part played by the central office in the continuity and stabilization of production. For example, the Manufacturing Department in New York is informed by the various factories as to the pounds of milk received daily. "If the supply of milk is inadequate for economical operation, the manufacturing department will issue instructions to some other factory to divert their milk to the manufacturing plant, or will change running instructions of this plant from either condensed to evaporated or some other manufactured product which the factory is qualified to run" (R. 43–44).

spondents are engaged in "occupation[s] necessary to the production" and, therefore, are themselves engaged in production within the meaning of the Act. They, too, are a necessary and integral part of the process of producing food products. Without their services, the nerve center contained in the Borden Building could not effectively direct and control the physical manufacture at the Borden plants and the entire process of manufacturing would be impeded, if not halted. The elevator operators, for example, by petitioner's own admission, are essential to interoffice communication, and frequent conferences between employees on different floors are indispensable to making the decisions governing the manufacturing operations and other phases of the company's business (R. 69). The night watchmen are necessary, obviously, to protect the building and its contents from fire and theft. *Walton* v. *Southern Package Corp.*, 320 U. S. 540. The work of the porters keeping the building clean and habitable is equally indispensable to the efficient performance of the multitude of productive activities there carried on. All are a part of the economic organization devoted to the production of goods.

For these reasons, we think that, if the Borden Building were located on the grounds of one of the Borden Company's manufacturing establishments rather than in midtown New York, it could not be disputed that respondents are covered by the Act.

If this is so, the same result must follow here, for the geographical separation is an obviously irrelevant element in this context. The significant factors are the functional interrelationship between the activities in the Borden Building and the processes of physical manufacture, and the fact that respondents' services are rendered primarily for an enterprise whose exclusive business is the production and sale of goods. The geographical separation between the physical manufacture and the center which controls and directs the physical manufacture is of no more consequence in this case than was the fact in the *Kirschbaum* case that the Kirschbaum and Arsenal Buildings were not owned or maintained by the manufacturing tenants on whose production of goods the case turned.

In view of the close integration between the activities carried on in the Borden Building and petitioner's other activities in the production of goods for commerce, there appears no practical basis for distinguishing between the maintenance employees here and the maintenance employees in the Kirschbaum and Arsenal buildings. The inappropriateness of any such distinction is substantiated by the "larger considerations of national policy, legislative history, and administrative practicalities" which the Court deemed controlling in the *Kirschbaum* case (316 U. S. at 523). On the facts of the present case it is plain

that such considerations dictate a liberal rather than a narrow application of the Act. The functions carried on by petitioner's employees in the Borden Building are not "activities which, if isolated, are only local" (*id.* at p. 521). Rather, they are an integral part of the activities of a national concern, incorporated in New Jersey, with headquarters in New York, carrying on manufacture and related functions all over the United States and in foreign countries. Construing the statutory language in "the context * * * of its implications in the relation between state and national authority" (*id.* at p. 525), we submit that there is no greater, but perhaps less, reason for excluding from the benefits of the Act the employees in this building than for excluding the employees in the Kirschbaum and Arsenal buildings.

The line of cases relied upon by petitioner (Br. 13–14) is of little aid to petitioner's case. In most of them, as petitioner concedes (Br. 14), it did not appear that the tenants were elsewhere engaged in the physical manufacture of goods for commerce, so that the issue revolved solely around the application of the narrower phrase of Section 7—"engaged in commerce." See *McLeod* v. *Threlkeld*, 319 U. S. 491, 493, 501; *Stoike* v. *First National Bank*, 290 N. Y. 195, 200–201 (1943), certiorari denied, 320 U. S. 762; *Convey* v. *Omaha National Bank*, 140 F. 2d 640, 642 (C. C. A. 8),

certiorari denied, 321 U. S. 781. Even in those few cases where, as asserted by petitioner, it did so appear,[10] the opinions make plain that the records before the courts had been constructed with relatively little attention to any showing of the nature of the activities carried on in the building or of the extent of the integration of such activities with the physical manufacture of goods. Possibly this deficiency in the records is to be attributed to the fact that the cases were tried before this Court had established that the scope of coverage under the "in commerce" phrase is narrower than that under the phrase "production of goods;" but whatever the cause, the courts in these cases devoted primary attention to the application of the phrase "in commerce"[11] which, we submit, is not

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[10] *Rucker* v. *First Nat. Bank of Miami, Okl.*, 138 F. 2d 699 (C. C. A. 10), certiorari denied, 321 U. S. 769; *Johnson* v. *Dallas Downtown Development Co.*, 132 F. 2d 287 (C. C. A. 5), certiorari denied, 318 U. S. 790; *Johnson* v. *Masonic Bldg. Co.*, 138 F. 2d 817 (C. C. A. 5), certiorari denied, 321 U. S. 780; *Lofther* v. *First Nat. Bank of Chicago*, 138 F. 2d 299 (C. C. A. 7). It seems scarcely accurate to include the *Dallas Downtown Development Co.* case in this category, in view of the court's statement (132 F. 2d at 289): "None of Appellee's tenants were engaged in the production of goods elsewhere, but some of them were agents for concerns so engaged."

[11] Cf. *Greene* v. *Mills Co.*, 224 N. C. 714, 718–719 1944): "It is not contended that plaintiff employees are engaged in any service necessary to the manufacture or production of goods intended for interstate commerce, since no

the true issue. In any event, in no one of the cases cited was there presented any such strong and decisive picture of integration between the work of office building employees and the physical processes of production as is here before the Court. The cases are factually too remote from the situation in the case at bar to be of value as guides.[12]

Moreover, even if the cited cases were to be regarded as faintly supporting petitioner's contention, it is incorrect to say, as petitioner does (Br. 13), that its contention "is supported by every decision handed down by Circuit Courts of Appeals and United States District Courts excepting the decisions of the Circuit Court of Appeals for the Second Circuit" in the instant case and the *Callus* case. The Circuit Court of Appeals for the Fourth Circuit may, we think, clearly be counted with the court below. See *Burton* v. *Zimmerman*, 131 F. 2d 377 (C. C. A. 4), where in an action by maintenance employees in a 15-story multi-tenant office building in Columbia, South Carolina, the

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manufacture or production of goods was carried on in the office building of the defendant in which they served. But it is contended that plaintiffs' duties in servicing the building bring them within the first named class as being 'engaged in commerce' because some of the occupants of the building which they serviced were so engaged."

[12] Our reference to the factual difference between the Borden Building and the office buildings involved in the cases discussed in the text should not be taken as modifying our criticism of those decisions as precedents even in the case of a multi-tenant office building such as that involved in the *Callus* case.

court stated that the complaint filed would have presented a case on "all fours" with the *Kirschbaum* case if plaintiffs had not abandoned the allegation that tenants of the building were engaged in "production of goods for commerce" as well as "in commerce." [13]

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[13] The court further held that, even under the phrase "in commerce" a full disclosure of the facts might warrant the conclusion that the maintenance employees were covered, depending upon the nature of the business of the tenants and the connection of the plaintiffs' work with that business; it refused to allow dismissal of the complaint, despite plaintiffs' admission that no tenant in the building was engaged in "production of goods" for commerce.

The *Zimmerman* case was decided before *McLeod* v. *Threlkeld*, 319 U. S. 491, and *Stoike* v. *First National Bank*, 290 N. Y. 195, and therefore in its "in commerce" aspect might not be followed now. However, it seems appropriate to suggest that although in the instant case no reliance is placed on the "in commerce" basis of coverage, the factual record here of constant and continuous interstate communication (by teletype, by exchange of detailed information, by distribution of instructions, as well as by the more usual kind and volume of business correspondence) might well support the conclusion that respondents' work, particularly that of the elevator operators (compare *Kirschbaum Co.* v. *Walling*, 316 U. S. at 519), was so closely related to such interstate communication and commerce as to be a part of it. Although the district court found that petitioner was engaged in interstate commerce in the Borden Building (R. 104, 120), both courts below rejected the contention that the maintenance employees were so engaged, on the authority of the *McLeod* and *Stoike* cases (R. 105, 129). We think that the courts below, as well as other courts, may be applying the *McLeod* decision too rigidly, and that the approach of the Circuit Court of Appeals for the Fourth Circuit in *Burton* v. *Zimmerman* represents the sounder view.

B. *Respondents' duties are necessary to the production of labels, photostats, reports and other "goods" physically produced in the Borden Building*

The building is devoted to the production of goods not only by reason of the extensive activities forming an integral part of the manufacture of the milk products and other food products, but also by reason of the labels, photostats, advertising copy, reports, and other "goods" physically produced in the building. The labels, photostats, advertising copy, etc., are "articles or subjects of commerce" within the statutory definition of "goods". *The Western Union Telegraph Co.* v. *Lenroot,* No. 49, this Term, slip opinion, p. 9; see also *Associated Press* v. *National Labor Relations Board,* 301 U. S. 103; *International Textbook Co.* v. *Pigg,* 217 U. S. 91. And these "goods" are "produced" by employees in the building who manually as well as intellectually "work on" and "handle" the materials. *Western Union* case, slip opinion, pp. 9–10. The drafting, writing, photostating, mimeographing, assembling, packaging, etc., of these materials are, we believe, clearly "incidental operation[s] preparatory to putting goods into the stream of commerce" (*ibid.,* p. 10).[14]

[14] The writing and preparation of newspaper and magazine articles, advertising copy, accounts, reports, and other written matter, for shipment in commerce, have been held to constitute "production of goods" in numerous cases arising

CONCLUSION

Whether or not the respondents are covered by the Act by reason of their relationship to the physical production of documents and other ma-

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under the Act, even prior to this Court's decision in the *Western Union* case. *Walling* v. *Sun Publishing Co.*, 47 F. Supp. 180 (W. D. Tenn.), affirmed, 140 F. 2d 445 (C. C. A. 6), certiorari denied, 322 U. S. 728 (newspaper articles); *Bittner* v. *Chicago Daily News Printing Co.*, 7 Wage Hour Rept. 1123 (N. D. Ill. 1944) (newspaper articles and advertising copy); *Berry* v. *34 Irving Place Corp.*, 52 F. Supp. 875 (S. D. N. Y.) (newspaper articles); *Reck* v. *Zarnocay*, 33 N. Y. S. 2d 582 (Sup. Ct. N. Y. Co. 1941) (advertising material, pamphlets, promotion material); *Schineck* v. *386 Fourth Avenue Corp.*, 49 N. Y. S. 2d 872 (N. Y. City Ct. N. Y. Co. 1944) (magazine manuscripts, advertising copy, art work); *Yunker* v. *Abbye Employment Agency*, 32 N. Y. S. 2d 715 (Mun. Ct. N. Y. City 1941) (employment bulletins and information); *Monk* v. *Continental Baking Co.*, 5 Wage Hour Rept. 205 (N. D. Tex. 1942) (bookkeeping records); see also *Lofther* v. *First National Bank*, 48 F. Supp. 692 (N. D. Ill.), where the district court ruled that "goods" as defined in the Act includes written reports and commercial documents, but held that the maintenance employees were not necessary to their production since it was not shown that they "actually handled" such goods. The circuit court of appeals affirmed, but only on the ground that plaintiffs were not "engaged in commerce" under the Act. 138 F. 2d 299, 301 (C. C. A. 7). In a number of other actions brought by maintenance employees in buildings owned and partially occupied by banks, recovery was denied on the assumption that only the "in commerce" basis of coverage was involved, without discussion of the question whether the issuance and preparation of bills of exchange, drafts, securities and other commercial banking instruments constitute "production of goods." *Rosenberg* v. *Semeria*, 137, F. 2d 742 (C. C. A. 9), certiorari denied, 320 U. S. 770; *Convey* v. *Omaha National Bank*, 140 F. 2d 640 (C. C. A. 8), certiorari denied, 321 U. S. 781; *Stoike* v. *First National Bank*, 290 N. Y. 195 (1943), certiorari denied,

terials in the Borden Building, all the activities carried on by petitioner's employees in the building were an integral part of the production of the Borden products. The court below, therefore, correctly held that respondents were within the protection of the Act on this ground.

Respectfully submitted.

CHARLES FAHY,
*Solicitor General.*

CHESTER T. LANE,
*Special Assistant to the Attorney General.*

DOUGLAS B. MAGGS,
*Solicitor.*

BESSIE MARGOLIN,
*Assistant Solicitor.*

FLORA G. CHUDSON,
*United States Department of Labor.*

MARCH 1945.

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320 U. S. 762; *Rucker* v. *First National Bank*, 138 F. 2d 699 (C. C. A. 10). In the *Rosenberg* case, for example, the court said that "the sole argument made on their [theemployees'] behalf is that they are 'engaged in commerce' ". 137 F. 2d at 744; to the same effect in the other three opinions, see 140 F. 2d at 641, 290 N. Y. at 200-201, and 138 F. 2d at 702. See also *Building Service Employees International Union* v. *Trenton Trust Co.*, 142 F. 2d 257 (C. C. A. 3); *Blumenthal* v. *Girard Trust Co.*, 141 F. 2d 849, 851 (C. C. A. 3).

Only a few decisions have held explicitly that the drafting and preparation of such materials and documents do not constitute "production of goods" within the meaning of the Act. See *Bozant* v. *Bank of New York*, 8 Wage Hour Rept. 68 (S. D. N. Y. 1944) (brochures, bulletins, reports); *Connelly* v. *Hamilton National Bank*, 184 S. W. 2d 173 (Tenn. Sup. Ct. 1944) (insurance policies, checks, instructions).

U. S. GOVERNMENT PRINTING OFFICE: 1945

# SUPREME COURT OF THE UNITED STATES.

No. 688.—October Term, 1944.

The Borden Company, Petitioner, vs. Joseph Borella, et al. | On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[June 11, 1945.]

Mr. Justice Murphy delivered the opinion of the Court.

Once again, as in *Kirschbaum Co.* v. *Walling*, 316 U. S. 517, we are required to consider the application of the Fair Labor Standards Act of 1938[1] to employees engaged in activities relating to the maintenance and operation of a building.

In the *Kirschbaum* case we held that the Act does apply to such employees working in a loft building in which large quantities of goods for interstate commerce are physically produced. In the instant case, the porters, elevator operators and night watchmen in question work in a 24-story office building in the business district of New York City. The building is owned and operated by the petitioner, the Borden Company, which is a New Jersey corporation engaged in the business of manufacturing milk products and other food products. Petitioner occupies approximately 17 of the 24 floors and 58% of the total rentable area. The remainder of the office space is leased to various tenants, none of which was found by the District Court to produce, manufacture, handle, process or in any other manner work on any goods in the building.[2]

Petitioner has manufacturing plants and factories in both the United States and Canada and its products are sold in large volumes throughout this and other countries. These establishments are admittedly engaged in the production of goods for interstate commerce. The heart of this industrial empire, however, lies in the central office building in New York City. Here the entire enterprise is supervised, managed and controlled.

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[1] 52 Stat. 1060, 29 U. S. C. § 201 *et seq.*

[2] The leasing of space to these tenants is incidental to the use of the building by the Borden Company and we need not consider whether the activities of the tenants are such as to constitute production of goods for commerce.

In this building the directors meet and the corporate officers conceive and direct the policies of the company. Although geographically divorced from the manufacturing plants, employees working in this building dictate, control and coordinate every step of the manufacturing processes in the individual factories. By means of direct teletype wires, they maintain detailed and meticulous supervision of the plants, the local superintendents exercising discretion only in the conduct of routine matters. While no products are actually processed or sold in the building, the purchase of raw materials and supplies, the methods of production, the amounts to be produced, the quantity and character of the labor, the safety measures, the budgeting and financing, the legal matters, the labor policies and the maintenance of the plants and equipment are all directed from this building. Such are the activities of petitioner's central office which is maintained, serviced and guarded by the respondent employees.

The respondents brought this suit against petitioner to recover overtime compensation and liquidated damages, plus reasonable counsel fees. The District Court denied relief, holding that they were not entitled to the benefits of the Act under the rule of the *Kirschbaum* case.[3] 52 F. Supp. 952. The Second Circuit Court of Appeals reversed the judgment. 145 F. 2d 63. We took the case because of the asserted conflict with the decision of the Tenth Circuit Court of Appeals in *Rucker* v. *First Nat. Bank of Miami, Okl.*, 138 F. 2d 699, and because of the importance of the issue as to the application of the *Kirschbaum* doctrine to such facts as are here presented.

Under Section 7(a) of the Act, overtime compensation must be paid to all employees "engaged in commerce or in the production of goods for commerce." As to the latter category of employees it is unnecessary that they directly participate in the actual process of producing goods inasmuch as Section 3(j) provides that "for the purposes of this Act an employee shall be

[3] The District Court also ruled that the preparation and drafting of labels, photostat and advertising material in petitioner's central office did not constitute "production of goods" within the meaning of the Act and that the case in this respect was controlled by McLeod v. Threlkeld, 319 U. S. 491, and Stoike v. First National Bank, 290 N. Y. 195. The Circuit Court of Appeals, however, found it unnecessary to pass upon this phase of the case. We likewise have no occasion to express our views on this matter since the determination of the main issue is sufficient to dispose of this case.

deemed to have been engaged in the production of goods if such employee was employed . . . in any process or occupation necessary to the production thereof, in any State." Our problem thus is to determine whether the respondent maintenance employees are engaged in a process or occupation necessary to the production of goods for commerce so as to come within the ambit of Section 7(a).

The *Kirschbaum* case made it clear that the work of maintenance employees in a building where goods were physically manufactured or processed had "such a close and immediate tie with the process of production for commerce, and was therefore so much an essential part of it, that the employees are to be regarded as engaged in an occupation 'necessary to the production of goods for commerce.'" 316 U. S. at 525-526. The maintenance of a safe, habitable building, with adequate light, heat and power, was deemed necessary to the production of goods for commerce. See also *Walton* v. *Southern Package Corp.*, 320 U. S. 540; *Armour & Co.* v. *Wantock*, 323 U. S. 126. The only distinction between this and the *Kirschbaum* case lies in the fact that here the employees work in a building where production of goods is administered, managed and controlled rather than carried on physically. We hold, however, that this distinction is without economic or statutory significance and that it cannot form the basis for concluding that the respondent employees are engaged in occupations unnecessary to the production of goods for commerce.

In an economic sense, production includes all activity directed to increasing the number of scarce economic goods. It is not simply the manual, physical labor involved in changing the form or utility of a tangible article. Such labor is but an integral part of the coordinated productive pattern of modern industrial organizations. Equally a part of that pattern are the administration, management and control of the various physical processes together with the accompanying accounting and clerical activities. Economic production, in other words, requires planning and control as well as manual labor.[4] He who conceives or directs

[4] In the words of the court below, "As was observed over a century ago, every process of manufacture (indeed for that matter every process by which men can affect the outside world at all) may be resolved into the movement of things in space; and it would be absurd to say that, although what the artisans do in the factory, or the dispatching clerks do upon the shipping platforms, is 'necessary' to 'production,' the directions they receive that govern all the movements they impart, are not 'necessary.'" 145 F. 2d at 65.

a productive activity is as essential to that activity as the one who physically performs it. From a productive standpoint, therefore, petitioner's executive officers and administrative employees working in the central office building are actually engaged in the production of goods for commerce just as much as are those who process and work on the tangible products in the various manufacturing plants. And since the respondent maintenance employees stand in the same relation to this production as did the maintenance workers in the *Kirschbaum* case, it follows that they are engaged in occupations "necessary" to such production, thereby qualifying for the benefits of the Fair Labor Standards Act.

We find nothing in the Act militating against this conclusion. Sections 7(a) and 3(j) both speak of production without attempting to limit its meaning to physical labor. Section 3(j) in particular defines the term "produced" not only in the physical sense of manufacturing, mining and handling but also in the more general sense of producing or "in any other manner" working on goods. In the absence of any contrary evidence we are unable to assume that Congress used the term in other than its ordinary and comprehensive economic sense. Indeed, the fact that Section 13(a)(1) specifically excludes from the provisions of Sections 6 and 7 those employees employed in a bona fide executive, administrative or professional capacity is clearly consistent with the conclusion that these activities are included within the concept of production as that term is used in the Act and that full effect should be given that fact unless otherwise provided. Thus where, as here, the work of employees is essential or necessary to such executive, administrative or professional activities of a productive nature the employees fall within the purview of Section 7(a) even though those directly engaged in such activities are by express exemption precluded from sharing in its benefits.

Nor do we find in the interpretative principles laid down in the *Kirschbaum* case any basis for holding that the respondent employees are not "necessary" to petitioner's production. Since they bear the same relation to production as did the maintenance employees in that case they cannot be considered any less essential to production; nor can this conclusion have any different "implications in the relation between state and national author-

ity." 316 U. S. at 525. Petitioner's industrial organization is such that the operation and maintenance of a central office building is essential to the economy, efficiency and continuity of production. In short, this office is "part of an integrated effort for the production of goods," *Armour & Co.* v. *Wantock, supra,* 130, and the statutory consequences that flow from that fact cannot be avoided.

The judgment below is

*Affirmed.*

Mr. Justice FRANKFURTER concurs in the result.

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Mr. Chief Justice Stone, dissenting.

No doubt there are philosophers who would argue, what is implicit in the decision now rendered, that in a complex modern society there is such interdependence of its members that the activities of most of them are necessary to the activities of most others. But I think that Congress did not make that philosophy the basis of the coverage of the Fair Labor Standards Act. It did not, by a "house-that-Jack-built" chain of causation bring within the sweep of the statute the ultimate *causa causarum* which result in the production of goods for commerce. Instead it defined production as a physical process. It said in § 3(j) "'Produced' means produced, manufactured, mined, handled, or in any other manner worked on" and declared that those who participate in any of these processes "or in any process or occupation necessary to" them are engaged in production and subject to the Act.

In *Kirschbaum Co.* v. *Walling,* 316 U. S. 517, after pointing out that Congress did not undertake to make the Act applicable to all occupations which affect commerce, we held that the services of elevator men and other service employees in a manufacturing loft building, where those services contributed to and assisted the manufacturing process carried on there, were within the Act. But nothing then decided or said seems to me to justify our saying that the elevator men and other maintenance employees in an office building, in which no manufacturing is done, either participate in or are necessary to the manufacturing process, because tenants of its building are executive or administrative officers of a company which does manufacturing elsewhere.

The fact that it is convenient or even necessary for the president of the company to ride in an elevator does not seem to me to meet the requirement of the statute that the occupation must be one necessary to the physical process of production. The statute includes those who are necessary to that process, but it does not also include those who are necessary to them. The manufacturing process could proceed without many activities which are necessary or convenient to the executive officers of a manufacturing company but which do not in any direct or immediate manner contribute to the manufacturing process, as did the services rendered in *Kirschbaum Co.* v. *Walling, supra.*

The services rendered in this case would seem to be no more related, and no more necessary to the processes of production than the services of the cook who prepares the meals of the president of the company or the chauffeur who drives him to his office. Compare *McLeod* v. *Threlkeld*, 319 U. S. 491. All are too remote from the physical process of production to be said to be, in any practical sense, a part of or necessary to it.

I would reverse the judgment.

Mr. Justice ROBERTS joins in this opinion.